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No. 85-800

IN THE

Supreme Court of the United States

October Term, 1985

PEOPLE OF THE STATE OF ILLINOIS,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND 16 OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

The amici states, through their attorneys general, respectfully offer this brief in support of the petition for a writ of certiorari. This case raises issues of considerable public importance the resolution of which will directly impact on the policies and actions of the amici states.

Most states have areas of particular natural beauty which they shield from inconsistent commercial and industrial activities. Although these pristine settings often represent only a small portion of any state and, taken together, a small portion of the nation, they are highly prized for the sense of well-being they impart to residents and the attraction they hold for tourists.

States are limited, however, in the extent to which they can protect these areas from inconsistent uses. When a federal agency has the power to issue permits, states must rely on the National Environmental Policy Act (NEPA) as the major means for protecting these havens of natural beauty from commercial and industrial intrusions. Because of their interest in securing the full protection of NEPA for scenic and recreational areas within their respective states, amici submit this brief in support of the petition.

SUMMARY OF THE ARGUMENT

The amici states agree with the arguments the State of Illinois puts forward in its petition for writ of certiorari. Application of the more searching reasonableness standard is necessary in reviewing a finding of no significant impact to ensure that federal agencies take the requisite "hard look" at the environmental effect of a proposed project. In addition, agencies cannot shirk their statutory duty to "study, develop, and describe appropriate alternatives to recommended courses of action" (42 U.S.C. § 4332(2)(E) (1985)) whenever a permit applicant simply claims there is no feasible alternative to a proposed action. Amici believe these points were adequately addressed in Illinois' petition and will focus instead on the Seventh Circuit's errors in assessing the significance of the federal agency's proposed action.

The Seventh Circuit did not adequately consider the scenic and recreational uses of Alton Lake in holding that barge fleeting had no significant environmental impact. Case law and the regulations of the Council on Environmental Quality (CEQ) require that federal agencies prepare an Environmental Impact Statement (EIS) when a proposed federal action is inconsistent with the local land use policy of preserving the natural environment. The Seventh Circuit should also have given more weight to aesthetic considerations in light of Alton Lake's scenic and recreational value.

In addition, the court wrongly considered the speculative cost of preparing an EIS in determining whether commercial barge fleeting would significantly impact the local environment. Not only is consideration of this cost factor unwarranted under the statute and regulations, but the court's inflated cost estimate unfairly tipped the balance toward finding

the fleeting activity had no significant impact. Because many of the scenic areas the states seek to preserve are not large, and the impact of inconsistent activities is hard to quantify, allowing consideration of the cost of preparing an EIS will too often result in a finding of no significant impact in scenic and recreational areas.

If the Seventh Circuit's decision is allowed to stand, it will seriously inhibit state attempts to protect areas of natural beauty within their borders. The reasonableness standard, the agencies' duty to consider alternative sites, and the consideration of land use and aesthetic factors in determining the significance of an action are all important components of NEPA protection which amici urge the Court to explicitly recognize.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ADEQUATELY CONSIDER THE SCENIC AND RECREATIONAL USES OF ALTON LAKE IN HOLDING THAT BARGE FLEETING HAD NO SIGNIFICANT ENVIRONMENTAL IMPACT.

Congress created the Great River Road in 1973 to provide people with access to the Mississippi River's scenic views and recreational activities. The State of Illinois joined in the effort by acquiring scenic easements along the river in the area of Alton Lake. Despite these efforts, the Army Corps of Engineers (Corps) issued a permit to a barge fleeting facility which will be, in the words of the Seventh Circuit, "an unfortunate eyesore, marring one of the few remaining spots of essentially unspoiled natural beauty on the Mississippi in the general vicinity of St. Louis." *River Road Alliance, Inc. v. Corps of Engineers of the United States Army,* 764 F.2d 445, 450 (7th Cir. 1985). Barge fleeting, in light of the state and federal efforts to preserve this scenic area, constituted a significant environmental impact requiring an EIS.

The creation of the Great River Road and Illinois' purchase of scenic easements are important factors in determining whether a commercial activity in that scenic area significantly affects the quality of the local environment. NEPA contemplates a cooperative relationship between federal, state and local governments. 42 U.S.C. §§ 4331(a), 4332(2)(C) (1985). Under the applicable regulations federal agencies are to cooperate with states "to the fullest extent possible." 40 C.F.R. § 1506.2(b) (1985). Here, both the federal and state governments have taken steps to protect the natural beauty of this stretch of river. To preserve the cooperative spirit essential

to the NEPA, federal agencies must consider whether a proposed action is in harmony with state plans for an area in assessing the significance of the action's impact.

Moreover, federal agencies are legally obligated to consider inconsistencies with local land use policy in assessing environmental impact. *Isle of Hope Historical Ass'n, Inc. v. United States Army Corps of Engineers*, 646 F.2d 215, 220 (5th Cir. 1981). Federal action consistent with local policy will generally have only an incremental environmental effect. When, on the other hand, the federal government overrides local protections, the impact is more keenly felt. *Maryland-National Capital Park and Planning Commission v. United States Postal Service*, 487 F.2d 1029, 1036 (D.C. Cir. 1973). Agencies should give local land use policy even more consideration when proposed actions threaten scenic and recreational areas preserved for their natural beauty. *See Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 613-16 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

The CEQ regulations defining significant impact reflect the concern for preserving local areas of natural beauty. 40 C.F.R. § 1508.27 (1985). Although the Seventh Circuit found these regulations to be "of little help," federal agencies are to accord them substantial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 356-58 (1979); *Fritiofson v. Alexander*, 772 F.2d 1225, 1236 (5th Cir. 1985); *Sierra Club v. Marsh*, 769 F.2d 868, 873 (1st Cir. 1985).

Under the CEQ regulations, agencies must consider both the context and the intensity of their actions in determining whether they significantly affect the environment. 40 C.F.R. § 1508.27 (1985). Consideration of the context means significance can vary with the setting of the proposed action. Where the impact is site specific as in the instant case, the agency

should assess the effects in the specific locality, regardless of whether the action may affect the human environment as a whole. 40 C.F.R. § 1508.27(a) (1985). In evaluating intensity, agencies are specifically directed to consider the "unique characteristics of the geographic area such as proximity to . . . park lands [and] wild and scenic rivers." 40 C.F.R. § 1508.27(b)(3) (1985). Moreover, agencies are to consider "whether the action threatens a violation of federal, state or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10) (1985).

The Corps avoided the directive of this last section by noting that the applicant's proposal would not "constitute a violation of the scenic easements acquired by the State of Illinois [because] [t]he easements apply only to specified areas lying landward of the landward edge of the Great River Road." Findings of Fact, Petitioners' Appendix at 55. The Corps may have avoided violating Illinois' scenic easements by permitting obstructions on the water rather than on the land, but it nonetheless violated its statutory duty. Technical violations of local law are not the touchstone for determining significant impact; rather it is the effect of the action given the state's policy in the particular area. In the instant case, permitting a commercial barge fleeting facility on a stretch of river reserved for scenic and recreational uses should be considered an action significantly affecting the environment.

Both the Seventh Circuit and the Corps also chose to ignore the CEQ regulation which directs federal agencies to consider the degree to which the proposed actions are likely to be highly controversial. 40 C.F.R. § 1508.27(b)(4) (1985). The term "controversial" refers to "cases where substantial dispute exists as to the size, nature or *effect* of the major federal action." *Foundation for North American Wild Sheep v. United States Department of Agriculture*, 681 F.2d 1172, 1182 (9th

Cir. 1982), quoting *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (emphasis in original).

Where the main value of an area is in its scenic and recreational uses, opposition to an inconsistent use is an indication that a substantial dispute exists as to the effect of the federal action. The Corps received strong objections to the proposed fleeting along the Great River Road in response to its solicitation of comments, including a petition signed by one thousand citizens who requested a hearing and offered objections. Findings of Fact, Petitioners' Appendix at 45. Most of the approximately 300 people who attended the public hearing were opposed to the barge fleeting because it marred and obstructed the natural beauty of the river and bluffs along the Great River Road. This degree of disagreement about the aesthetic impact of the barge fleeting earmarks the Corps' action as precisely the type of controversial undertaking for which an EIS must be prepared.

Contrary to the Seventh Circuit's opinion, aesthetic impact alone is enough to compel preparation of an EIS when federal action threatens state scenic and recreational areas. Congress declared the importance of aesthetics to national environmental policy when it provided that the federal government's responsibility is to "assure for all Americans . . . esthetically and culturally pleasing surroundings." 42 U.S.C. § 4331(b)(2) (1985). The aesthetic value of a place includes its "existence value . . . the feeling some people have just knowing that somewhere there remains a true wilderness untouched by human hands." *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1322 n. 27 (8th Cir. 1974). In that case, the court considered as important the effect that the visibility of logging roads would have on the "rustic natural beauty" of the Boundary Waters Canoe Area. *Id.* at 1322.

The difficulty of measuring aesthetic effects should not prevent them from being the basis for requiring an EIS. "[T]he elusive character of aesthetics does not mean that such concerns are less weighty. Rather, the impossibility of quantification means, at most, that a finding as to the role of aesthetics need not be supported by statistical evidence." *City of New Haven v. Chandler*, 446 F.Supp. 925, 930 (D. Conn. 1978). Moreover, where a state, as the representative of its people, acquires scenic easements in order to preserve an area's natural beauty and provide public access to its vistas, the aesthetic value cannot be dismissed as a matter of individual taste. Such action indicates a community, as opposed to individual, decision that an area is aesthetically pleasing.

Aesthetics must be given substantial consideration when the question is whether commercial activity may invade an area preserved for enjoyment of the natural environment. Here, the scenic area is one of the few natural refuges in proximity to a major urban center. Regardless of other activities on the river, this fleeting facility may be "the straw that breaks the back of the environmental camel," in terms of Illinois' attempt to preserve some unspoiled beauty on the Mississippi. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) (*Hanly II*), *cert. denied*, 412 U.S. 908 (1973).

In enacting NEPA, Congress required agencies to take a "hard look" at the environmental consequences before taking action. *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). Whether reviewed under an arbitrary and capricious standard or a reasonableness standard, the Corps has failed to take a hard look at the effect of its action on the scenic and recreational uses of Alton Lake. If allowed to stand, the court's interpretation of NEPA law

will have an adverse effect on all state and local government plans to protect scenic and recreational areas. States will be discouraged from preserving areas of natural beauty if they are not assured that at the very least an EIS will be required when federal agencies permit commercial activity in protected areas.

II. THE SPECULATIVE COST OF PREPARING AN ENVIRONMENTAL IMPACT STATEMENT SHOULD NOT BE A FACTOR IN DETERMINING WHETHER AN AGENCY'S ACTION HAS A SIGNIFICANT ENVIRONMENTAL IMPACT.

Judge Posner states "the purpose of an environmental assessment is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement." Neither the CEQ regulations nor any other circuit court opinion has suggested that the expense of preparing an EIS has any bearing at all on the question of whether environmental effects are significant. *See* 40 C.F.R. § 1508.9 (1985).[1] An EIS must be prepared if substantial questions are raised as to whether a project "may cause significant degradation of some environmental factor." *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973). Clouding the issue with inflated estimates of the cost of preparing an EIS is contrary to the intention of the statute.

[1] Section 1508.9 provides that the purpose of an environmental assessment is to (1) briefly provide sufficient evidence and analysis for determining whether or not to prepare an environmental impact statement, (2) aid an agency's compliance with the Act when no environmental impact statement is necessary, and (3) facilitate preparation of the statement when one is necessary.

The relevance of the cost of preparing an environmental impact statement turns on Judge Posner's assumption that the Environmental Assessment (EA) is merely a less expensive version of the EIS. He states that the significance of an impact can be measured by determining whether the "time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides." Under NEPA and its implementing regulations, however, an EA is not a substitute for an EIS; they serve very different purposes. *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985). The purpose of an EA is simply to identify and gauge the significance of potential impacts on the environment. An EIS is an indepth study which gives a federal agency the data necessary to decide whether or not to go forward with a project that involves significant impacts and how to mitigate those impacts. *Id.*; 40 C.F.R. § 1502.1 (1985).[2]

Even if a cost benefit analysis were somehow appropriate at this stage, the court unfairly assumes that the cost would

[2] 40 C.F.R. § 1502.1 provides:

> The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

be so great as to be prohibitive in most cases. The court states that the implementing regulations require an EIS to be a "formidable document". On the contrary, CEQ regulations state that the text of final environmental impact statements shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages. 40 C.F.R. § 1502.7 (1985). Since agencies are required to give substantial deference to these regulations, presumably the more unwieldy EIS of the past will give way to trimmer future versions.

Furthermore, the court's cost benefit analysis fails to take into consideration that the most litigated issue under NEPA is whether an action requires an EIS. *See* Council on Environmental Quality Annual Report (1979). In the long run, agencies may save time and expense by devoting effort to the production of an EIS, instead of trying to prove an EIS is not needed. *Sierra Club v. Marsh, supra,* 769 F.2d at 875; *Maryland-National Capital Park and Planning Commission v. U. S. Postal Service, supra,* 487 F.2d at 1040.

CONCLUSION

When federal, state and local governments set aside certain areas for public enjoyment because of their natural beauty, federal agencies should not lightly conclude that commercial or other activity inconsistent with scenic and recreational enjoyment has no significant impact. Local land use policy and aesthetic considerations are important factors in this context. Moreover, the cost of preparing an environmental impact statement should have no bearing on the threshold question of whether an impact is significant enough to warrant an EIS. If the Seventh Circuit's interpretation of NEPA law is allowed to stand, it will undermine state efforts to preserve areas of unspoiled beauty and discourage similar efforts in the future.

Because the Court of Appeals misconstrued NEPA law on these points and the points raised in Illinois' petition for a writ of certiorari, amici curiae join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Seventh Circuit.

Respectfully submitted,

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